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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit's grant of summary judgment improperly deny Air Wisconsin pilots a right to trial on their claim that their free speech, voting and other Landrum-Griffin rights were infringed in connection with the imposition of a union trusteeship?

2. In Duty of Fair Representation cases, does the restrictive standard followed by the Seventh Circuit unduly circumscribe the rights of union-represented employees to an effective judicial remedy?

3. Are disputed contractual rights of union members arising from a union constitution and related documents subject to drastically different rules of interpretation by the courts than the contractual rights of other parties litigant?

LIST OF PARTIES
TO PROCEEDINGS BELOW

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

v.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, WILLIAM P. HALE, TRUSTEE, and DENNIS HIGGINS, TRUSTEE,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Air Wisconsin Pilots Protection Committee, James M. Fenske, Gary M. Pelach, Richard J. Magiera and Thomas K. Bly, plaintiffs in the proceedings below, respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit filed on July 30, 1990. By an order of this Court dated October 20, 1990, the time for filing a petition for a writ of certiorari in the above entitled case was extended to and including November 27, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, Air Wisconsin Pilots Protection Committee v. Sanderson, is found at 909 F.2d 213 (7th Cir. 1990). The unreported decision of the United States District Court for the Northern District of Illinois (Eastern Division) is set forth in the Appendix at pages 4a-20a.[1]

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[1]Citations followed by the suffix "a" refer to the Appendix annexed hereto. Citations preceded by the prefix "A" refer to the Appendix filed by petitioners filed in the United States Court of Appeals in the Seventh Circuit.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on July 30, 1990. The time for petitioning for certiorari was extended to and including November 27, 1990, by an order of this Court. (1a.)

STATUTES INVOLVED

The Labor-Management and Disclosure Act of 1959 ("Landrum-Griffin Act"), 29 U.S.C. §§ 401 et seq., contains provisions guaranteeing the free speech and voting rights of union members, and protects them against abusive trusteeships imposed upon subordinate bodies or officers.

Section 101(a)(1), 29 U.S.C. §

411(a)(1), provides in pertinent part that every union member

> "... shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization . . . and to participate in the deliberations and voting upon the business of such meetings, subject to the reasonable rules and regulations in such organization's constitution and bylaws."

Section 101(a)(2), 29 U.S.C. § 411(a)(2), guarantees to a union member the

> "... right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organizations his views . . . upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct which would interfere with its performance of its legal

or contractual obligations." (Emphasis added.)

Section 302, 29 U.S.C. § 462, provides that trusteeships over a subordinate union body must be established must be established

> "...only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organizations." (Emphasis added.)

Section 304(a), 29 U.S.C. § 464(a), provides in pertinent part:

> "Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate."

Section 304(c), 29 U.S.C. § 464(c), provides in pertinent part:

> "After the expiration of the eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302." (Emphasis added.)

Under the Railway Labor Act, as amended, 45 U.S.C. §§ 151 et seq., which is made applicable to air carriers by 45 U.S.C. §§ 181-182, Section 2, 45 U.S.C. § 152 First, provides in pertinent part that bargaining agents have the duty

> "...to exert every reasonable effort to make and maintain agreements, concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute

between the carrier and the employees thereof."

Section 2, 45 U.S.C. § 152 Third, provides in pertinent part that

> "... [r]epresentatives, for the purpose of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives...."

STATEMENT OF THE CASE

This case involves a trusteeship imposed in 1986 by the Air Line Pilots Association, International ("ALPA").

The trusteeship was imposed against a subordinate unit of ALPA referred to as the Air Wisconsin Master Executive Council ("MEC") and against the chief officers thereof, who were removed from office at the same time.

The trusteeship was imposed in November 1986, several months after a group of Air Wisconsin pilots had unsuccessfully attempted to replace ALPA as the bargaining representative for Air Wisconsin pilots. (A-19.)

The plaintiffs in this action include James M. Fenske, Chairman of the MEC, and two of the other officers of the MEC elected by Air Wisconsin pilots, Gary M. Pelach, the Secretary-Treasurer and Richard J. Magiera, a member of the MEC, all of whom were removed from office by ALPA. (A-13.) Other parties plaintiff include the Air Wisconsin Pilots Protection Committee and Thomas K. Bly, Chairman.

Defendants include ALPA and three of the four trustees who have been appointed by ALPA in succession to replace Fenske as Chairman of the MEC.

During the four-year period of the trusteeship, the trustees exercised dictatorial powers over the functions normally performed by officers of their choice elected by the Air Wisconsin pilots.

An assistant trustee, Ted Fergus, was appointed by ALPA. Although he was an assistant trustee, Fergus filed an affidavit below that strongly objected to the trustee's actions in suppressing the expression of the views of the Air Wisconsin pilots for the purpose of the negotiation of a new collective bargaining agreement. (A-463-470.)

The reason assigned by ALPA for trusteeship was that Fenske, as Chairman of the MEC, had a secret ballot conducted by the Honest Ballot Association, to ascertain the desires of the Air Wisconsin pilots with respect to

a revised seniority list. The revised list would modify a seniority list that had become a part of the collective bargaining agreement as a result of an arbitration conducted in 1985 when a smaller airline, Mississippi Valley, was merged into Air Wisconsin.

The arbitration was an outgrowth of a procedure contained in ALPA's Merger Policies and Related Employee Protective Provisions issued in January 1985. (A-102.)

The arbitration panel, chaired by Rolf Valtin, found that as a group, the Air Wisconsin pilots "... were the older pilots - - both in terms of age and in terms of length of service with their company." (A-139; footnote omitted.)

Nevertheless, the seniority list resulting from the arbitration put Mississippi Valley pilots ahead of more

senior Air Wisconsin pilots as a result of a "job lumping" approach used by the arbitrators. The "job lumping" approach was based upon the differing types of aircraft flown by the respective carriers at the time of the merger. (A-148-149.)

Since the aircraft flown by Mississippi Valley were relatively smaller than those flown by Air Wisconsin, the Mississippi Valley group received a disproportionately large share of captains in the combined work force. The Air Wisconsin pilots therefore received more junior positions than otherwise would have been the case. (A-148-149.)

The arbitration award is dated October 7, 1985. (A-168.)

Following the issuance of the arbitration decision, the resulting

seniority list was incorporated into the new collective bargaining agreement for the merged airlines. (A-16.)

The resulting collective bargaining agreement had a termination date of October 31, 1988. (A-16.)

In the secret ballot conducted by the Honest Ballot Association, the Air Wisconsin Pilots voted 88-25 in favor of adopting a proposal for a revised seniority list that had been developed by the Master Executive Council. The revised seniority list embodied the date-of-hire principle, and was prospective in its application only. (A-20.)

The ballot had been conducted at the specific request of two elected officials of ALPA Local Council 50 on Air Wisconsin. (A-348.)

The trusteeship was imposed on the grounds that such action constituted an effort "to change the final and binding nature of the seniority list resulting from an arbitrated award under ALPA merger policy by a majority vote, conducted outside the auspices of the Association ...." (A-23.)

The district court granted defendants' motion for summary judgment, and dismissed the case. It did so notwithstanding substantial issues of material fact shown in the affidavits filed by plaintiffs. (4a-20a.)

In this defense, Chairman Fenske stated that on two prior occasions in that same year, similar ballots had been conducted, and that he previously had been told by an officer of ALPA "that if we could come up with something that a majority of the pilots wanted,

that the Airline Pilots Association would then stand behind it." (A-350-351.)

In addition, Fenske's affidavit stated that the appointment of a trustee was unwarranted because any future agreement to change the seniority list would have to be signed by the President of ALPA in any event. (A-351.)

Fenske's affidavit also made a showing of shocking violations of his right to a fair hearing when the appeal of his removal and the imposition of the trusteeship reached the level of the ALPA Board of Trustees in October 1988. (A-362-367.)

In addition, the affidavits of Fenske and others showed that ALPA used the trusteeship as a means of influencing the outcome of the representation

election conducted in January 1989. (A-366-369.)

Whereas ALPA had won the 1986 election by 13 votes (A-19), its margin was reduced to five votes by the time of the January 1989 election. (A-461.)

Substantial evidence of acts of interference and intimidation by ALPA to influence the outcome of the election was presented. (A-450-454; 496-499.)

Therefore, since a change in only three votes would have changed the outcome of the 1989 election, it was shown that but for such activities of interference and coercion by ALPA and its trustee, ALPA would have been voted out. (A-450-451.)

The district court incorrectly granted summary judgment on the basis that "in this case Fenske has not been removed" (17a) notwithstanding a clear

showing to the contrary from defendants' own documents. (A-313)

The district court also incorrectly stated, "There is no membership right to vote." (18a.)

As stated above, similar votes on the same subject had previously been conducted on two prior occasions. (A-350.)

In addition, the ALPA Constitution and By-Laws provide that such ballots may be conducted at the "option" of the MEC. (A-78.)

In addition, under the ALPA Constitution and By-Laws, the Air Wisconsin pilots had a clear right to vote for their representatives on the MEC who were removed by ALPA. (A-53, A-56.)

The MEC is a subordinate unit of ALPA established under its Constitution and

By-Laws. The powers of the MEC are broad in scope (A-56):

> C. The Master Executive Council of an airline is empowered to make the final decision on any problem or problems of the members of that airline except as provided elsewhere in the Constitution and By-Laws. The decisions of the Master Executive Council shall be considered as the decisions of the members of the airline and shall be acted upon accordingly. However, nothing in this Section shall authorize any Master Executive Council to initiate any action that is inconsistent with this Constitution and By-Laws or with the best interests of the Association or the general membership."

The decision of the district court in granting summary judgment was affirmed by the Seventh Circuit. The Seventh Circuit ignored the errors of the district court referred to above.

In addition, the Seventh Circuit incorrectly stated (909 F.2d at 214):

"The facts are not in dispute."

As shown below, a substantial number of issues of material fact were in dispute.

Review by this Court is warranted because of the abuse of summary judgment procedures in a case involving important free speech and voting rights guaranteed to union members.

Non-Record Subsequent Developments

It is anticipated that respondents will seek to avert the issuance of a writ of certiorari on grounds of recent developments that are not of record.

It is our understanding that the trusteeship was abruptly terminated on or about October 28, 1990, shortly after respondents became aware on October 20, that petitioners' request for an extension of time within which to file the petition for a writ was extended by an order of Mr. Justice Stevens. (1a.)

The abrupt termination of the trusteeship followed on the heels of the signing of a five-year collective bargaining agreement (two years back, and three forward) negotiated by the trustee and his hand-picked negotiating committee.

Although the contract was called "concessionary," a more apt terminology would be "sweetheart."

The contract is in the nature of "fruit of the poisonous tree" that perpetuates the evils of the trusteeship three years into the future.

Not only is the arbitrated seniority list continued unnegotiated and hence unchanged thereunder, but substantial changes were made by locking in the Air Wisconsin pilots to compulsory, dues-paying provisions under which they are

deprived of their rights under their customary grievance procedure.

ALPA's true motive has become apparent in that it has already used provisions in the new contract as a basis for instituting disciplinary proceedings to harass the Air Wisconsin pilots whose objection to the four-year trusteeship has taken the form of withholding dues on the grounds that they were not being represented by their collective bargaining "agent," but by non-elected trustees.

Further, the claims of the Air Wisconsin pilots for damages as a result of actions in violation of their claim of contractual rights under the ALPA Constitution and By-Laws, and also under the ALPA Merger Policies and Related Employee Protective Provisions continue

unaffected by the dissolution of the trusteeship.

ARGUMENT

I. THE QUESTION OF THE LANDRUM-GRIFFIN RIGHTS OF THE UNION DISSIDENTS WARRANTS REVIEW

The opinion below assumes that, because the Air Wisconsin pilots lost representation elections, they were bad losers not deserving of a judicial remedy under the Landrum-Griffin Act. (909 F.2d at 215.)

It is submitted that, in such circumstances, the intra-union voting and free speech rights guaranteed by the Landrum-Griffin Act are more, not less, important.

The anti-judicial remedy bias inherent in the mindset of the Court is apparent from the language of the Seventh Circuit's opinion. The

"disgruntled" Air Wisconsin pilots, having "struck out ... twice in the electoral marketplace," and "undaunted" by defeat, "refused to call it quits," and instead "turned to the courts" in what the writer of the opinion refers to, with evident distaste, as "the characteristic style of modern Americans ...." (909 F.2d at 215.)

It is submitted that, in our Constitutional system, it is for Congress to say whether the public interest requires a judicial remedy to be made available, and it is not the province of the Courts to erect artificial barriers to such remedies as may be created by Congress in statutes such as the Landrum-Griffin Act, no matter how much individual judges may disagree with the premises of such statutory remedies as may be provided.

Having decided the case on summary judgment, under the strict subjective "intentional violation" standard employed by the Seventh Circuit in Duty of Fair Representation cases ("nothing more is required to comply with the duty of fair representation ... so long as the union does not intentionally harm a member or class of members" [909 F.2d at 216]), the Court apparently was unaware (a) that ALPA is the dominant pilots' union in the airline industry and (b) that pilots in a small feeder airline accordingly would only with great reluctance give up their ALPA membership entree' to high-paying jobs in the majors.

The question of whether Congress intended a judicial remedy to be withheld when a possible electoral remedy could create irreparable injury

of its own because of the existence of a partial labor monopoly is of great importance.

The Seventh Circuit also engaged in circular reasoning in that it chose to give weight to evidence that a motive for the trusteeship was to retaliate against and punish those deemed responsible for the election attempt by an independent union (21a-22a, 26a-27a) and that but for direct interference by ALPA under the auspices of the third trustee put into the position, the independent union would have won the second election (28a.)

The illogic of the Seventh Circuit's view that dissidents vulnerable to a dominant union's power structure are less deserving of judicial remedies that Congress provided in the Landrum-Griffin Act than are victims of other

types of discrimination is readily apparent.

The Seventh Circuit stated, "It cannot be said too often that the judicial remedies available to employees unhappy with their collective bargaining representative are highly limited." (909 F.2d at 217.)

However, that is not what this Court said when it decided Sheet Metal Workers' Association v. Lynn, ___ U.S. ___, 109 S.Ct. 639 (1989), a decision that came down after the two prior Seventh Circuit decisions on which that court principally relied.

Sheet Metal Workers', supra, reinforces the point that a major objective of the Landrum-Griffin Act is insuring internal democracy within unions by protecting the right to

discuss and criticize union policies and leadership.

The Seventh Circuit would neuter the Landrum-Griffin remedies by withholding their availability from subordinate union officials.

Although Sheet Metal Workers' is perfunctorily cited in the opinion (909 F.2d at 219), the statement immediately following -- "but they are not entitled to continue to exercise a trust that they have abused" -- is notably circular. Whether conducting a ballot to ascertain the desires of the membership, in accordance with past practice, and powers conferred by the constitution, is an "abuse" of a trust, or the proper implementation of such a trust, is a matter of serious concern, particularly in light of the Landrum-Griffin Act's express purpose of

"restoring democratic procedures ...." (29 U.S.C. § 462.)

The pertinent question is whether to discuss and debate the proper interpretation of the ambiguous Merger Policies and Related Employee Protective Provisions document issued by ALPA only a short time before, in the beginning of 1985 (A-102), constitutes an "abuse" of the position of a subordinate union official or, instead, an essential part of the functioning of the democratic process itself.

If union policies are not to be evolved through the process of discussion and argument by both union officials and members, just how are they to be evolved is left unanswered by the Seventh Circuit's opinion.

However, the question was not left unanswered in the Sheet Metal Workers'

case. That case holds that the removal of an elected union subordinate union official for exercising his Landrum-Griffin free speech rights to oppose and criticize union policies carried out in the process of a trusteeship violated the Landrum-Griffin Act.

The district court's attempt to distinguish Sheet Metal Workers' on the ground that that case involved free speech on matters "not legitimately related to any union concern" (17a), trivializes the nature of the guarantee of free speech rights, amd mis-reads the purport of this Court's decision.

When the views expressed are related to matters of direct union concern, free speech becomes vastly more important than when they are not.

The district court's attitude is also inconsistent with the language of the

Landrum-Griffin Act that guarantees a member's right to "express any views, arguments, or opinions ...." (29 U.S.C. § 411(a)(2); emphasis added.)

Free speech rights are not worth much if they do not include the right either to debate the proper interpretation or to seek modification of policies unilaterally proclaimed by a union hierarchy. The district court's limitation of free speech to matters "not legitimately related to any union concern" (17a) could hardly have been what Congress intended to protect when it enacted the Landrum-Griffin Act.

II. THE TREATMENT OF AN ARBITRATION AWARD AS AN IMMUTABLE NEGATION OF BARGAINING DUTIES RAISES SERIOUS RAILWAY LABOR ACT ISSUES

Collective bargaining agents are created and given special statutory status for one reason and one reason

only: to engage in collective bargaining.

This was done under the Railway Labor Act for an important public purpose: to avoid interruptions to the services provided by common carriers caused by dissatisfaction with rates of pay, rules and working conditions through collective bargaining. (45 U.S.C. § 152 First.) See Wisehart, "Transportation Strike Control Legislation: A Congressional Challenge," 66 MICH.L.REV. 1697 (1968).

Seniority has long been a central item in labor negotiations, so much so in fact that it has been held to be a "mandatory" requirement of the duty to bargain. J.I. Case v. NLRB, 253 F.2d 149, 153 (7th Cir. 1958).

However, the effect of the decision below is to foreclose forever bargaining

over an arbitrated seniority list that became part of the bargaining agreement following the merger of Mississippi Valley into Air Wisconsin.

It matters not, according to the courts below, that the arbitration award was an ad hoc adjustment based upon the configuration of the fleets of aircraft that existed at that instant of time in a rapidly changing industry. (A-146: "We disregard the parties' respective forecasts for 1986 and beyond ....")

Nor did it matter that the arbitration itself was an "interest" arbitration as opposed to a "rights" arbitration, the end result of which was merely to become part of the collective bargaining agreement. (29a-32a.)

By some mystical process which the Court of Appeals never bothers to explain, unlike every other part of the

bargaining agreement, which can be changed by negotiation, the seniority clause is thereby rendered untouchable in perpetuity because of ALPA's unilateral "policy" declaration that "final and binding" means it is forever released from its bargaining duties to the Air Wisconsin pilots on this one subject that has so devastating an effect upon their future interests throughout the entire work-life expectancies of so many of them. (Fenske Aff., A-360.)

There never has been a decision that exalts an arbitration award to such a sacred status that so transcends the union constitution, the collective bargaining agreement even the collective bargaining duty that is central to the statutory scheme of the

Railway Labor Act. (45 U.S.C. § 152 First.)

Further, the Monday morning quarterbacking attitude of the Court of Appeals, such a weird result should have been foreseen by the Air Wisconsin pilots, and they should have sued to upset the arbitration on some such extreme grounds as "fraud" (909 F.2d at 216), rather than relying on the common sense assumption that the end product of the arbitration -- a clause in the new bargaining agreement for the merged airline -- would be treated no differently than the other clauses therein and, like them, would be subject to negotiation for future application when the opportunity rolled around.

The Seventh Circuit's statement that "There is no way in which ALPA's interpretation of the provisions

bearing on the merger of seniority lists could be thought unreasonable" (909 F.2d at 218) is out of touch with the realities and practice of collective bargaining insofar as it involves "interest" arbitrations, as shown in the affidavit of Thomas K. Bly. (A-445-449.)

In the Steelworkers Trilogy, this Court held that "rights" arbitrations play an important part in the collective bargaining process. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). See also Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

However, this Court has never held that an arbitration award --

particularly one resulting from a non-statutory arbitration as here involved -- would be permitted to supersede a collective bargaining agent's statutorily imposed bargaining duties on a permanent basis.

Such a result would be an anomaly with regard to an "interest" arbitration award that becomes a part of the bargaining agreement itself.

The distinction between interest and rights arbitrations is described in Elkouri & Elkouri, How Arbitration Works, Chapter 3, in which it is pointed out that interest arbitrations are "quasi-legislative" in nature because they are not grounded in the interpretation of a bargained-for agreement.[2]

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[2] Elkouri & Elkouri, How Arbitration Works (1985-87 Supplement) (Washington, D.C.: BNA, 1988), p. 23.

The result of the decision below is to permit the circumvention of the performance of bargaining duties on a permanent basis based upon a "policy" unilaterally adopted by the union's hierarchy. Such a result is of grave importance to the proper performance of the duty of collective bargaining as mandated by the Railway Labor Act, see Virginian Railway Co. v. System Federation No. 40, 330 U.S. 315 (1937), and well worthy of this Court's attention.

III. THE SEVENTH CIRCUIT'S "INTENTIONAL VIOLATION" STANDARD CONFLICTS WITH THE LESS RESTRICTIVE STANDARD FOLLOWED BY ALL OTHER CIRCUITS IN DFR CASES

The Seventh Circuit has long held that the duty of fair representation is enforceable only in "intentional misconduct" cases, a limitation that has

given the Seventh Circuit itself difficulty.

As noted in a recent Seventh Circuit decision on the subject, Thomas v. United Parcel Service, Inc., 890 F.2d 909, 922, fn. 5 (7th Cir. 1989):

> "Ours is the only circuit to require proof of intentional misconduct."

The footnote continues with citations to decisions in the Ninth, Sixth, Eleventh, Fourth, Third, Fifth, Second, Eighth, D.C., Tenth, and First Circuits, all approving a standard less restrictive than the subjective "intentional misconduct" standard used in this case. (909 F.2d at 216.)

The majority opinion in Thomas obviously regarded the Seventh Circuit's rule in DFR cases to be out of step with Vaca v. Sipes, 386 U.S. 171 (1967), and decisions in other circuits,

but felt constrained to follow the restrictive decisional law as it has evolved in the Seventh Circuit.

The application of the Seventh Circuit's intentional misconduct standard in the context of a summary judgment motion proved to be lethal to plaintiffs' case. It is submitted that the decision of the Seventh Circuit conflicts with the cases decided in other circuits both on the appropriate DFR standard and on the use of summary judgment in such cases.

Performance of the Duty of Fair Representation is of particular importance with regard to the issue of seniority.

Seniority is an issue that is uniquely within the province of the union.

Thus if the union abdicates its function, rather than performing its mandatory statutory duty to bargain, the affected employees are bereft of one of the principal responsibilities for which they are compulsorily required to pay union dues to a bargaining "agent" for representing them.

In such circumstance, "... the individual employee stands alone against a single entity: the joint union/employer." Breininger v. Sheet Metal Workers' Int'l Ass'n Local Union No. 6, ___ U.S. ___, 110 S.Ct. 424, 437 (1989).

The premise of the non-performance of such a mandatory duty inevitably will create enormous dissatisfaction and unrest in the workplace, a consequence that is particularly serious when it involves an airline in view of safety

considerations. (45 U.S.C. § 152 First.)

The President of Air Wisconsin stated at his deposition that he had told the pilots in substance that he wanted them to come up with some revisions in the arbitrated list in the bargaining agreement "before all-out war breaks out ...." (A-427-428.)

The desire of the Air Wisconsin pilots for negotiations on the subject of seniority also finds substantial support in the relevant documents promulgated by ALPA itself. These include the Constitution and By-Laws as well as the Merger Policies and Related Employee Protective Provisions issued by ALPA in 1985.

The Constitution and By-Laws lists as one of the union's fundamental objectives the establishment of "...

uniform principles of seniority for members of the Association ...." (Art. I, Section 6(F); A-41.)

The Constitution and By-Laws specify that it is a responsibility of the union "to seek the adoption and perpetuation thereof." (Art. I § 6(F); A-41.)

The Merger Policies and Related Employee Protective Provisions document states that seniority of pilots is to be based upon "the length of service of a pilot with the company." (Section 45.02.01(B); A-113.)

It is further provided that the "Home Office" of ALPA "... is instructed to use every means at its command in standardizing for prospective application" the seniority clause of "all pilot working agreements." (Section 45.02.01(C); A-113.)

Thus rather than supporting the position of ALPA that, in view of the arbitration decision, it will never do anything further on the subject of seniority in representing the Air Wisconsin pilots, the language of ALPA's own documents would lead a "reasonable person" to conclude that, based upon the clear discrepancy between the arbitrated list and the "length of service" principle, more remains to be done in the forum of collective bargaining.

Nor is the duty thus imposed upon ALPA inconsistent with the arbitrated list that became a part of the first merged working agreement.

The arbitrated list, as pointed out above, had no life of its own beyond the term of the collective bargaining agreement. The duty imposed by the ALPA Merger Policies and Related

Employee Protective Provisions does not look backward but instead quite specifically makes reference to negotiating forward "for prospective application" a "length-of-service" seniority clause in "all pilot working agreements." (A-113; emphasis added.)

The supposition, implicit in the decisions below, that an arbitration award providing a short-term solution to flight crew assignment problems involving two different aircraft fleets of a merged airline may be used permanently to block collective bargaining concerning one of the most important terms in future contracts is contrary to the principle and purpose of collective bargaining both as it is practiced and as it is enshrined in national labor policy. See Holzhauer, The Contractual Duty of Competent

Representation, 63 Chi-Kent L. Rev. 255 (1987).

The silencing of such a debate regarding competing interpretations of constitutional and related provisions by the removal of and imposition of a trusteeship on subordinate officials elected by the pilots whose interests are directly involved is inherently destructive of the very representational form of union government that the Seventh Circuit's opinion purports to espouse. (909 F.2d at 219.)

ALPA's action discriminated against Air Wisconsin pilots by depriving them of a meaningful right to speak and vote, contrary to decisions in other circuits. Pignotti v. Local 3, Sheet Metal Workers, 343 F. Supp. 236, 242-43 (D. Neb. 1972), aff'd, 477 F.2d 825 (8th

Cir.), cert. denied, 414 U.S. 1067 (1973); Sabolsky v. Budzanski, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1972).

Directly contrary to the Seventh Circuit's ruling below is a D.C. Circuit decision, Lamb v. Miller, 660 F.2d 792, 794 (D.D.C. 1984).

Lamb v. Miller holds that removal of a local union official for his continuing opposition to what are stated to be the policies of the international is violative of the Landrum-Griffin Act.

Lamb v. Miller also holds that summary judgment was improperly granted because of the existence of dispute fact issues on the subject.

The decision below therefore is inconsistent with Lamb v. Miller in two important respects.

Especially when good faith is in question in such cases, as it is here, a court must refrain from granting summary judgment. Hotel & Restaurant Employees & Bartenders v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980).

The Seventh Circuit's comments regarding the functions and role of the Air Wisconsin Master Executive Council, a subordinate unit of ALPA, itself gives rise to the interpretation of ambiguous provisions in the Constitution that should have precluded summary judgment.

The Seventh Circuit's opinion fails to consider the plain statement in the Constitution that, subject to certain exceptions, the Master Executive Council of an airline "is empowered to make the final decision on any problem or problems of the members in that airline, except as provided elsewhere in the

Constitution and By-Laws." (Art. IV, § 2C; A-56.)

The Constitution also provides that "The decisions of the Master Executive Council shall be considered as the decisions of the members of the airline and shall be acted upon accordingly." (Art. IV, § 2C; A-56.)

The Seventh Circuit's denial that the Air Wisconsin pilots had any right to be heard on the subject of seniority through the voting of a secret ballot, as their elected representatives had requested, is similarly inconsistent not only with the Constitution and By-Laws of ALPA, but also with the theory of representative government which the Seventh Circuit's opinion endorses.

ALPA's Constitution and By-Laws create a membership right to vote upon "Any contract, letter of agreement, or

letter of understanding that, in the opinion of the MEC, substantially affects the pay, working conditions, career security of pilot members ...." (Art. XVIII § 2B; A-78; emphasis added.)

The Seventh Circuit's statement about representative democracy in the next-to-last paragraph of its opinion totally confounds the true nature of representative democracy, under which the powers flow up from those who are represented, and from whom all powers are ultimately derived, rather than, as in the case of a dictatorship, from the top down.

Trustee Hale frankly admitted that he had blocked the right of the MEC to use the roll-call voting procedure specifically provided by the Constitution and By-Laws for the choice

of the members of the all-important Negotiating Committee. (A-321b.) Trustee Hale himself, of course, was not elected, but appointed. Thus the action of the various non-elected trustees in appointing members of the negotiating committee meant that the process did not constitute the working of true representative democracy, as stated by the Seventh Circuit's opinion (909 F.2d at 219), but its obverse.

IV. THE USE OF DRASTICALLY DIFFERENT RULES OF INTERPRETATION OF THE CONTRACTUAL RIGHTS OF UNION MEMBERS, AS OPPOSED TO OTHER PARTIES LITIGANT, WARRANTS REVIEW

This Court has held that union members may have enforceable contract rights against the union itself arising from the union constitution and related documents. Plumbers & Pipefitters v.

Local 334, Plumbers & Pipefitters, 452 U.S. 615, 619 (1981).

However, in Pipefitters, the Court specifically declined to decide what standard should be used by courts to interpret the contractual rights of members arising from a union constitution or by-laws. (452 U.S. at 627.)

Since Pipefitters, some courts--including the Seventh Circuit -- have failed to realize that claims by union members alleging breach of a union constitution or by-laws are essentially breach of contract actions and have mechanically applied pre-Pipefitters criteria to post-Pipefitters suits.

Rather than applying the rules of contract interpretation that courts would apply to any other breach of contract action, these courts, including

the decision below (909 F.2d at 218), have relied upon pre-Pipefitters cases and their progeny for the proposition that courts should defer to the interpretation of union constitutions by the group in power in the union, no matter how self-serving such an interpretation may be.

Such an approach effectively negates the jurisdiction of the courts to provide a remedy for breach of contract claims.

See Perry v. International Longshoremen's Assn., 638 F. Supp. 1441, 1446 (S.D.N.Y. 1986).

The Seventh Circuit drastically departed from the standard rules of interpretation applied to contractual rights of parties litigant generally in its evaluation of the contractual claims of the plaintiffs below in two respects.

* First, the Seventh Circuit applied the rule that such contractual claims of union members should be denied unless the interpretation given by the hierarchy to the constitution, by-laws, and other promulgations by the union is "unreasonable" and "perhaps even 'patently unreasonable.'" (909 F.2d at 218.)

Such a rule of interpretation is diametrically opposed to the usual rule of contract interpretation under which the meaning of the words used is resolved against the party from which the document emanated, and in favor of the other party, or the promisee. 4 Williston on Contracts, § 621 (3d ed. 1961).

As stated in the Restatement of Contracts 2d § 206:

> Interpretation Against the Draftsman

> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

The Seventh Circuit's decision turns the normal rule used in interpreting contractual rights topsy-turvy.

Under the Seventh Circuit's decision, the language is interpreted in favor of the officialdom that wrote the document on which the claims are based, and against those to whom the promises were made.

Pragmatically, the language used should have been regarded as comparable to that of an insurance policy in terms of the relationship between the source of the language, the ALPA headquarters that was responsible for preparing it, and the individual Air Wisconsin pilots to whom the language was subsequently

issued in the form of assurances that they relied upon in paying their dues.

That being the case, it is fundamental that the meaning used is to be construed most strongly against the party using them, instead of in its favor, as in the Seventh Circuit's decision. See 4 Williston on Contracts § 621, pp. 764-5 (3d ed. 1961).

The Seventh Circuit's decision also violates the rule that related provisions appearing together in a document are to be interpreted so as to give effect to both, so that neither clause will be rendered a nullity. 4 Williston on Contracts (3d ed. 1961) § 619, p. 731.

So construed, the "final and binding" provision relating to arbitration awards is interpreted, as it was here in the practice followed by the parties, in

making it a part of the current collective bargaining agreement. Thus there is no necessary conflict between that clause and the prospective duty to bargain regarding seniority in the negotiation of <u>future</u> agreements as the "Home Office" is directed to do by a separate but related provision in the same document. (A-113.)

In the second place, the interpretation of ambiguous language has been repeatedly held to be a fact issue precluding summary judgment in other circuits, including the Second.

As stated in the recent case of <u>Record Club of America v. United Artists Records</u>, 890 F.2d 1264, 1270-1271 (2d Cir. 1989):

> "Summary judgment as to the meaning of a contract term may not be granted when the term's meaning is not clear or is reasonably susceptible to more than one interpretation. 'Where contract

> language is ambiguous, the differing interpretations of the contract present a triable issue of fact. Summary judgment is therefore inappropriate.' [Citations omitted.]"

The Seventh Circuit's opinion virtually concedes that the language is ambiguous. It emasculates the "goal" that the ALPA constitution sets forth regarding seniority by calling it "preamble-like." (909 F.2d at 217.) Then, turning to the policy statement issued by ALPA dealing specifically with mergers and related pilot protective provisions, it acknowledges that it specifically provides that "seniority as a pilot shall be based upon the length of service as a pilot with the Company," but disregards this as also being "preambular" (909 F.2d at 218) and also ignores the direction given to the Home Office for prospective application in future agreements referred to above.

Whether the provisions to be interpreted are "preambular" as opposed to enforceable is a question of fact that should have precluded summary judgment.

Further, when direct evidence of personal malice is presented, as here, in the affidavits claiming that the trusteeship was imposed in retaliation for the attempt by Fenske, Jakawich and others to set upon an independent union (21a-23a) the assumption that the result was the outcome of a "reasonable interpretation" as opposed to being the outgrowth of other factors is a fact issue not determinable on summary judgment.

Curiously, the cases relied on by the Seventh Circuit to support its claim that deference should be given to the union's interpretation of contractual

rights emanating from its own documents (909 F.2d at 218) -- Local Union No. 657 v. Sidell, 552 F.2d 1250, 1257 (7th Cir. 1977), Millwright Local No. 1079 v. United Brotherhood of Carpenters & Joiners, 878 F.2d 960, 962 (6th Cir. 1989), Loretangeli v. Critelli, 853 F.2d 186, 192 (3d Cir. 1988), and Newell v. International Brotherhood of Electrical Workers, 789 F.2d 1186, 1189 (5th Cir. 1986) -- all indicate that, contrary to the result below, summary judgment may not be granted when there are material issues fact in dispute with regard to such interpretation, as are here presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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